CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 469

VANCOUVER STEAMSHIP COMPANY, LTD.,
PETITIONER,

vs.

THERESA RICE, ADMINISTRATRIX OF THE
ESTATE OF VINCENT CATINO, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1932

CERTIORARI GRANTED DECEMBER 5, 1932

(37,166)

(37,166)

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

LORD & MOULTON, 1107 Spalding Building, Portland, Oregon,
For the Appellant.

ERSKINE WOOD and GUNTHER F. KRAUSE, 1310 Yeon Building, Portland, Oregon,
For the Appellee.

CITATION ON APPEAL.

District Court of the United States of America, District of Oregon.

To Steamship "City of Vancouver," Vancouver Steamship Company, Ltd., a Corporation, and to Erskine Wood and Gunther F. Krause, Your Proctors, GREETING:

WHEREAS, Theresa Rice, administratrix of the estate of Vincent Catino, deceased, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be

corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 4th day of December, in the year of our Lord one thousand nine hundred and thirty-one.

JAMES ALGER FEE,
Judge.

Due service admitted this 25th day of November, 1931.

GUNTHER F. KRAUSE,
Of Proctors for Respondent and Claimant.

[Endorsed]: Filed Dec. 4, 1931. [1*]

In the District Court of the United States for the District of Oregon.

The Steamship "CITY OF VANCOUVER," Her Engines, Boilers, Hull and Furniture.

THERESA RICE, Administratrix of the Estate of VINCENT CATINO, Deceased,

Libelant;

VANCOUVER STEAMSHIP COMPANY, LTD., a Corporation,

Claimant.

LIBELANT'S STIPULATION FOR COSTS.

On April 10, 1930, there was filed in the above-entitled court a libel *in rem* by Theresa Rice, administratrix of the estate of Vincent Catino, de-

*Page-number appearing at the foot of page of original certified Apostles on Appeal.

ceased, as libelant, against the Steamship "City of Vancouver," her engines, boilers, hull, and furniture, said libel being numbered A–10977 in said court; on said date said libelant filed stipulation for costs, which is in words and figures as follows, to wit:

KNOW ALL MEN BY THESE PRESENTS that I, Theresa Rice, Principal and L. M. French and L. J. Struett, sureties, are held and firmly bound unto the above-named respondent, the steamship "City of Vancouver," in the sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said respondent, to the payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Dated this 10th day of April, 1930.

WHEREAS the above-named Theresa Rice, as administratrix of the estate of Vincent Catino, deceased, has commenced a proceeding in admiralty in the above-entitled court against said respondent, in a cause of damages, civil and maritime,—

NOW, THEREFORE, the condition of this obligation is such that if the said Theresa Rice shall prosecute as aforesaid and pay all costs and disbursements, if such shall be awarded against her by the final decree of the aforesaid court, then this obligation shall [2] be void, otherwise it shall remain in full force and virtue.

MRS. THERESA RICE,
Libelant and Principal.
L. J. STRUETT,
L. M. FRENCH,
Sureties.

United States of America,
District of Oregon,—ss.

We, L. M. French and L. J. Struett, each being duly sworn, on oath say, each for himself: That I am worth the sum of Five Hundred Dollars ($500.-00) over and above all just debts and liabilities and property exempt from execution; that I am not a sheriff, clerk or other officer of any court.

L. M. FRENCH.
L. J. STRUETT.

Subscribed and sworn to before me this 10th day of April, 1930.

WM. P. LORD,
Notary Public for Oregon.

My commission expires Feb. 26, 1933.
Filed April 10, 1930.

Thereafter on April 12, 1930, there was filed in said cause a claim of owner by the Vancouver Steamship Company, Ltd., a corporation, as the owner of said steamship "City of Vancouver," and on said date said claimant filed in said cause a stipulation to abide by decree and for costs, in words and figures as follows, to wit:

CLAIMANT'S STIPULATION TO ABIDE BY DECREE AND FOR COSTS.

WHEREAS, a libel was filed in this court by the above-named libelant on the 10th day of April, 1930, against the steamship "City of Vancouver," etc., for the reasons and causes in said libel mentioned; and [3]

WHEREAS, a claim to said steamship has been filed by Vancouver Steamship Company, Ltd., and the said claimant and American Surety Company of New York hereby consenting and agreeing that in case of default or contumacy on the part of the claimant execution may issue against their goods, chattels and lands for the sum of Ten Thousand Dollars ($10,000.00),—

NOW, THEREFORE, it is stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned are, and each of them is, bound in the sum of Ten Thousand Dollars ($10,000.00), CONDITIONED that the claimant above named shall abide by and pay the money, including costs, awarded by the final decree rendered in this cause by this court, or, in case of appeal, by the Appellate Court.

Dated this 11th day of April, 1930.

VANCOUVER STEAMSHIP COMPANY, LTD.,
By GUNTHER F. KRAUSE,
One of its Proctors,
Principal.

AMERICAN SURETY COMPANY OF NEW YORK,
By W. A. KING,
Resident Vice-President,
Surety.

Attest: N. CODY,
Resident Asst. Secretary.

(Seal American Surety Company, New York.)

Filed April 12, 1930.

Thereafter, on January 5, 1931, said claimant filed in said cause exceptions to said libel, and on said date filed exceptive allegations and the affidavit of Verne S. Gearey in support thereof; thereafter on April 6, 1931, said exceptions and exceptive allegations were heard by the court by the Honorable James Alger Fee, United States District Judge; and on April 13, 1931, the court, by the Honorable James Alger Fee, United States District Judge, made and entered an order sustaining the first exception to the libel, and required the libelant to file an amended libel, and further overruled the second exception to the libel and overruled the exceptive allegations. [4]

And afterwards, to wit, on the 29th day of April, 1931, there was duly filed in said court an amended libel, in words and figures as follows, to wit: [5]

In the District Court of the United States for the District of Oregon.

THERESA RICE, Administratrix of the Estate of VINCENT CATRINO, Deceased,

Libelant,

vs.

Steamship "CITY OF VANCOUVER," Her Engines, Boilers, Hull and Furniture,

Respondent.

AMENDED LIBEL IN REM.

To the District Court of the United States for the District of Oregon—In Admiralty Sitting:

Leave of court being had, Theresa Rice of Astoria, in the District of Oregon, administratrix of the estate of Vincent Catino, deceased, brings this her amended libel against the above-named Steamship "City of Vancouver," her engines, boilers, hull and furniture, in a cause of damages, civil and maritime, and thereupon propounds as follows:

ARTICLE I.

That on or about the 1st day of December, 1929, the above-named steamship "City of Vancouver" was berthed at the dock of the Westport Lumber Co. at Westport, Oregon, and was lying in the navigable waters of the Columbia River, and a cargo of lumber was being taken aboard said vessel by means of the winches and loading gear belonging to and a part of fixed gear of said steamship, and prior to the matters and things hereinafter complained about, the owners and/or charterers of said steamship had entered into a contract with the Astoria Stevedoring Company, a corporation, to load said steamship with said cargo of lumber, at a fixed price, and agreed, among other things, that the said owners and/or charterers would furnish good and seaworthy winches for loading [6] said lumber on to said steamship, and keep and maintain said winches in a good and seaworthy condition during the loading of said steamship, and the said

stevedoring company did agree to furnish longshoremen to operate said winches and stow the cargo of lumber in the cargo spaces of said steamship, and to fully load said steamship.

ARTICLE II.

That thereupon and in pursuance of said contract libelant's intestate was employed as a longshoreman by the aforesaid stevedoring company, to assist in loading said cargo of lumber into the cargo spaces of said steamship, and on said 1st day of December, 1929, said Vincent Catino, libelant's intestate, was engaged in his said work in loading said steamship and was standing on the deck of said steamship near a hatch, and a sling load of lumber was being hoisted from said dock over the deck of said steamship, and while said load was being so hoisted and was over the deck of said steamship, the winch carrying said load suddenly lost its purchasing power, and said load fell toward the deck, striking libelant's intestate, and so crushing him that he was mortally injured, while engaged in said employment, and while said vessel was lying in the waters of the Columbia River, and thereupon the said sling load of cargo was removed from the body of said Vincent Catino and at said time said Vincent Catino was bleeding internally, and was so unconscious from said injury that he did not know or comprehend the nature of any act, and thereupon said Vincent Catino was placed on a stretcher and removed to an emergency hospital in the village of Westport or thereabouts, and one hour thereafter,

without regaining the possession of his faculties, said Vincent Catino expired.

ARTICLE III.

That said winch was unseaworthy in that a wedge or key which is a part of said winch was worn or rusty and did not hold [7] in place, and came out of gear while in operation, and the maintenance of said key was a part of the duty of the owners and/or charterers of said steamship, through its officers and crew, and as a direct and proximate result of said negligent acts libelant's intestate lost his life, and his estate has been damaged thereby in the sum of Ten Thousand Dollars ($10,000.00).

ARTICLE IV.

That during all the times herein mentioned there was a certain statute of the State of Oregon known as Section 51-601 of Chapter VI, Title LI, Oregon Code Annotated, 1930, which provides as follows:

"51-601. Claims giving rise to liens.—Every boat or vessel used in navigating the water of this state or constructed in this state shall be liable and subject to a lien:

1. For wages due to persons employed, for work done or services rendered on board of such boat or vessel.

2. For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such

boat or vessel, on account of labor done or materials furnished, by mechanics, tradesmen or others in the building, repairing, fitting and furnishing, or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of launchways constructed for the launching of such boat or vessel.

3. For all sums for wharfage, anchorage, or towage of such boat or vessel within this state.

4. For all demands or damages accruing from the nonperformance or mal-performance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed, and for damages or injuries done to persons or property, by such boat or vessel, and for damages or injuries by such boat or vessel resulting in the death of any person."

ARTICLE V.

That by consideration of certain proceedings had in the County Court of the State of Oregon for the County of Clatsop, libelant was appointed administratrix of the estate of said deceased, and letters of administration have issued and have not been revoked. [8]

ARTICLE VI.

That libelant's intestate was a frugal and industrious man and had an expectancy of life of up-

wards of twenty years, and had he survived would have accumulated an estate of Ten Thousand Dollars ($10,000.00).

ARTICLE VII.

That prior to the institution of this proceeding and on the 17th day of December, 1929, libelant elected to sue the third party liable, in accordance with the right of election provided for in the Longshoremen and Harborworkers' Compensation Act.

ARTICLE VIII.

That libelant's address is 167 Exchange Street, Astoria, Oregon.

ARTICLE IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE your libelant prays that a citation according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue to the owners and/or charterers of the steamship "City of Vancouver," citing and admonishing them to appear and answer all and singular the matter aforesaid; and that the Court will be pleased to pronounce for the damage aforesaid, with interest and costs, and will give the libelant such other and further relief as in law and justice she is entitled to receive.

THERESA RICE,
Libelant.

LORD and MOULTON,
Proctors for Libelant.

Filed April 29, 1931. [9]

And afterwards, to wit, on the 18th day of May, 1931, there was duly filed in said court exceptions to amended libel, in words and figures as follows, to wit: [10]

[Title of Court and Cause.]

EXCEPTIONS TO AMENDED LIBEL.

Comes now the claimant, Vancouver Steamship Company, Ltd., a corporation, by its proctors Erskine Wood and Gunther F. Krause, and excepts to the libel for the reason that it does not state a cause of suit in admiralty.

Upon the hearing, proctors for claimant will contend that neither the law of the admiralty nor the law of the United States provides a remedy for the personal representative of a longshoreman injured upon a ship on the navigable waters of a state against a person other than the longshoreman's employer when the injuries result in death upon the land. Libelant relies for her cause of suit upon a statute of the State of Oregon known as the Boat Lien Law. This act, however, is not applicable to a case such as the one out of which this suit arises. The Oregon act applies only to injuries caused by the vessel and not injuries occurring on the vessel.

WHEREFORE, claimant prays that the libel may be dismissed [11] for want of jurisdiction.

ERSKINE WOOD,
GUNTHER F. KRAUSE,
Proctors for Claimant.

Filed May 18, 1931.

THEREAFTER on the 8th day of June, 1931, the said exceptions came on for hearing before the court before the Honorable JAMES ALGER FEE, United States District Judge, for the District of Oregon. [12]

And afterwards, to wit, on Monday, the 16th day of November, 1931, the same being the 11th judicial day of the regular November term of said court—Present, the Honorable JAMES ALGER FEE, United States District Judge, Presiding—the following proceedings were had in said cause, to wit: [13]

[Title of Cause.]

MINUTES OF COURT—NOVEMBER 16, 1931 —ORDER SUSTAINING EXCEPTIONS TO AMENDED LIBEL.

This cause was heard by the court upon the exceptions of the claimant to the amended libel herein, and was argued by Mr. William P. Lord, of proctors for the libelant, and by Mr. Erskine Wood, of proctors for the claimant. Upon consideration whereof,—

IT IS ORDERED that the said exceptions be and the same are hereby sustained. [14]

And afterwards, to wit, on Wednesday, the 18th day of November, 1931, the same being the 13th judicial day of the regular November term of said court—Present, the Honorable JAMES ALGER FEE, United States District Judge, Presiding—the following proceedings were had in said cause, to wit: [15]

In the District Court of the United States for the District of Oregon.

The Steamship "CITY OF VANCOUVER," Her Engines, Tackle, etc.

THERESA RICE, Administratrix of the Estate of VINCENT CATINO, Deceased,

Libelant,

vs.

VANCOUVER STEAMSHIP COMPANY, LTD., a Corporation,

Claimant.

MINUTES OF COURT—NOVEMBER 18, 1931 —DECREE DISMISSING LIBEL.

This matter came on regularly for hearing upon claimant's exceptions to the amended libel, libelant appearing by his proctor, Wm. P. Lord, claimant being represented by its proctors, Erskine Wood and Gunther F. Krause, and the Court having heard the arguments of counsel and examined the briefs submitted by counsel, and being now fully advised,—

It further appearing that libelant has declined to plead further,—

It is now here ORDERED AND DECREED that claimant's exceptions to the amended libel be and they hereby are sustained and the libel be and it hereby is dismissed with costs against libelant and in favor of claimant herein taxed at $———;

It is further ORDERED that the stipulators and their sureties upon the stipulation of claimant for costs and to abide by and pay the decree be and they hereby are exonerated from all liability herein.

Dated this 18th day of November, 1931.

JAMES ALGER FEE,
Judge.

Filed November 18, 1931. [16]

And afterwards, to wit, on the 4th day of December, 1931, there was duly filed in said court a notice of appeal, in words and figures as follows, to wit: [17]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Vancouver Steamship Company Ltd., a Corporation, and to Erskine Wood and Gunther F. Krause, Your Proctors:

You and each of you are hereby notified that Theresa Rice, administratrix of the estate of Vincent Catino, deceased, libelant in ths suit, intends

to appeal and does hereby appeal to the United States Circuit Court of Appeals for the Ninth Judicial District from the final decree and order heretofore and on the —— day of November, 1931, made and entered in this suit, which said final decree adjudged that the exceptions to amended libel be sustained, and that the libel be dismissed with costs, and that the stipulators and their sureties upon the stipulation for costs be exonerated from all liability, and libelant hereby appeals from the said final decree and the whole thereof.

Dated at Portland, in the District of Oregon, this 24th day of November, 1931.

THERESA RICE,
Administratrix of the Estate of Vincent Catino, Deceased.

WM. P. LORD,
By ——————————,
Her Proctors.

Filed December 4, 1931. [18]

And afterwards, to wit, on the 4th day of December, 1931, there was duly filed in said court, assignments of error, in words and figures as follows, to wit: [19]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Now comes the above-named libelant-appellant herein, and says:

That in the record and proceedings in the above-entitled cause, there is manifest error, and said libelant-appellant now makes, files, and presents the following assignment of errors upon which it will rely as follows:

I.

The Court erred in sustaining the "claimant's"—appellee's—exceptions to the amended libel.

II.

The Court erred in dismissing libelant-appellant's libel, and in ordering and adjudging that that libelant-appellant's cause of suit for the wrongful death of said deceased be dismissed.

III.

The Court erred in awarding costs and that the stipulators and their sureties be exonerated from any and all liability.

WHEREFORE libelant-appellant prays that the decree herein be reversed and set aside and the proceedings in this cause [20] be remanded to the trial court.

LORD & MOULTON,
Proctors for Libelant.

Filed December 4, 1931. [21]

And afterwards, to wit, on Friday, the 4th day of December, 1931, the same being the 24th judicial day of the regular November term of said court—Present, the Honorable JAMES ALGER FEE, United States District Judge, Presiding—the following proceedings were had in said cause, to wit: [22]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 4, 1931—ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND.

Based on the records and files herein,—

IT IS ORDERED that the appeal be and the same is hereby allowed, and the amount of the bond on appeal is hereby fixed in the sum of Two Hundred and Fifty Dollars ($250.00).

Dated this 4th day of December, 1931.

JAMES ALGER FEE,
Judge.

Filed December 4, 1931. [23]

And afterwards, to wit, on the 4th day of December, 1931, there was duly filed in said court, undertaking on appeal, in words and figures as follows, to wit: [24]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS,

that we, Theresa Rice, libelant in the above-entitled cause, and appellant, as principal, and L. J. Struett and L. M. French, as sureties, are held and firmly bound unto the Vancouver Steamship Company, Ltd., claimant, in the sum of $250.00 to be paid to the said Vancouver Steamship Company, Ltd., for which payment well and truly to be made, we bind ourselves and our successors jointly and severally by these presents, conditioned, however, that

WHEREAS, Theresa Rice, libelant hereinabove named, has heretofore made to the United States Circuit Court of Appeals for the Ninth Circuit, an appeal from the certain final decree entered in the United States District Court of the District of Oregon, on the —— day of November, 1931, under and by virtue of the terms of which the libel and complaint herein was dismissed, and a decree was entered in favor of the claimant and respondent, and also awarding costs and disbursements to claimant and respondent,—

NOW, THEREFORE, the condition of this obligation is such that Theresa Rice shall prosecute such appeal to effect and that she will abide by and perform whatsoever decree may be rendered [25] by the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, or on the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, by the court below, and will answer all damages and costs in a not greater amount that $250.00, the amount of this bond, but, however, in case the said Theresa Rice shall perfect her appeal and make good her plea in the

United States Circuit Court of Appeals for the Ninth Circuit, then this undertaking shall be void and held in naught; otherwise to remain in full force and effect.

THERESA RICE, Administratrix,
Principal.
By WM. P. LORD,
Her Attorney.
L. J. STRUETT,
L. M. FRENCH,
Sureties.

Done in the presence of:
MARIE BENNETT.
HELEN HORR.

State of Oregon,
County of Multnomah,—ss.

We, L. J. Struett and L. M. French, being first duly sworn, each for himself says: that I am a resident of said County and State; that I am worth the sum of $500.00 over and above all just debts and liabilities and property exempt from execution; that I am not a sheriff, clerk or other officer of any court.

L. J. STRUETT.
L. M. FRENCH.

Subscribed and sworn to before me this 23d day of November, 1931.

MARIE BENNETT,
Notary Public for Oregon.

My commission expires Feb. 26, 1933.

Approved this 24th day of November, 1931.

JAMES ALGER FEE,
Judge.

Filed December 4, 1931. [26]

And afterwards, to wit, on Friday, the 4th day of December, 1931, the same being the 24th judicial day of the regular November term of said court—Present, the Honorable JAMES ALGER FEE, United States District Judge, Presiding—the following proceedings were had in said cause, to wit: [27]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 4, 1931—ORDER APPROVING BOND ON APPEAL.

Based on the records and files herein,—

IT IS ORDERED that the bond on appeal with L. J. Struett and L. M. French as sureties is hereby approved.

Dated this 4th day of December, 1931.

JAMES ALGER FEE,
Judge.

Filed December 4, 1931. [28]

And afterwards, to wit, on the 11th day of December, 1931, there was duly filed in said court, a praecipe for *transcript*, in words and figures as follows, to wit: [29]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

The Clerk of this court is hereby directed to prepare and certify a copy of the record in the above-entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit, including the following documents, omitting verification of pleadings, admissions of services and endorsements on covers other than date of file-marks, and also omitting title of cause other than set forth in the amended libel:

Amended libel.
Exceptions to amended libel.
Decree of court.
Notice of appeal.
Undertaking on appeal.
Assignment of errors.
Citation on appeal.
Order allowing appeal.

LORD & MOULTON,
Proctors for Libelant.

Filed December 11, 1931. [30]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 2 to 30 inclusive, constitute the apostles on appeal from a final decree in said court in the case of The Steamship "City of Vancouver," her engines, boilers, hull, and furniture, in which Theresa Rice, administratrix of the estate of Vincent Catino, deceased, is libelant and appellant, and the Vancouver Steamship Company, Ltd., a corporation, is claimant and appellee; that the said apostles have been prepared by me in accordance with the rules of court and the praecipe filed by said appellant, and that the transcript of the record and proceedings had in said court in said cause, is a full, true and complete transcript thereof as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $4.65, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 19th day of December, 1931.

[Seal] G. H. MARSH,
Clerk. [31]

[Endorsed]: No. 6698. United States Circuit Court of Appeals for the Ninth Circuit. Theresa Rice, Administratrix of the Estate of Vincent Catino, Deceased, Appellant, vs. Vancouver Steamship Company, Ltd., a Corporation, Claimant of the Steamship "City of Vancouver," Her Engines, Boilers, Hull and Furniture, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the District of Oregon.

Filed December 21, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6698

United States
Circuit Court of Appeals
For the Ninth Circuit

THERESA RICE, Administratrix of the Estate of Vincent Catino, Deceased,

Appellant,

vs.

VANCOUVER STEAMSHIP COMPANY, LTD., a Corporation, Claimant of the Steamship "City of Vancouver," her engines, boilers, hull and furniture,

Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PRINAU-WALSH PRINTING CO., 766 MARKET ST., SAN FRANCISCO

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the twelfth day of May, in the year of our Lord one thousand nine hundred and thirty-two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JEREMIAH NETERER, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeal in above cause argued by Mr. Erskine Wood, proctor for the appellee, and submitted on brief on file on behalf of the appellant, and submitted to the court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of August, in the year of our Lord one thousand nine hundred and thirty-two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the opinion and dissenting opinion this day rendered by this Court in the above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this Court in accordance with the majority opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Oregon.

Before: WILBUR and SAWTELLE, Circuit Judges, and NETERER, District Judge.

WILBUR, Circuit Judge.—The decedent was aboard a ship alongside the dock at Westport, Oregon. He was engaged in doing the work of a longshoreman aboard the ship, being an employe of Astoria Stevedoring Company. A load of lumber which was being hoisted to put aboard ship fell on the decedent and injured him so severely that he died shortly after being taken ashore. The trial court dismissed the libel on the ground that it had no jurisdiction in admiralty over the tort resulting in the death of the decedent. The trial court followed the decision of Judge Bean in The Kaian Maru, 2 F. (2d) 121, holding that the law of Oregon permitting recovery for death was a death statute, that is, a statute permitting the relatives to recover for injuries they suffer by reason of the death of a decedent, and that under such a statute the injury to them occurred at the time of death and not at the time of the accident and that as the death and consequent injury to them had occurred ashore, admiralty had no jurisdiction, whereas, in his opinion, had the death occurred aboard ship or had the statute under which recovery was permitted been

a survival statute, that is, a statute wherein the decedent's right to recover for a tort survives, and can be enforced by his executors, administrators or heirs, the admiralty court would have had jurisdiction. It is not questioned that the courts of Oregon have consistently held that the statute of Oregon permitting the recovery for death is what is known as a death statute. There are a number of decisions of district courts holding that under such statutes the right of action arises at the time of death and not at the time of injury, and consequently, where the death occurs ashore there is no jurisdiction in admiralty. The Kaian Maru, 2 F. (2d) 121, supra; Pickles v. Leyland (D. C. Mass.), 10 F. (2d) 371; Ryley v. Philadelphia & R. Ry. Co. (D. C. N. Y.), 173 Fed. 389. The jurisdiction of admiralty has been sustained in two cases by Circuit Courts of Appeals, one in the fourth circuit, where the death occurred ashore (The Anglo-Patagonian, 235 Fed. 92), and another in the fifth circuit, where the death occurred ashore (The Chiswick, 231 Fed. 452). In each of these cases the state statute involved, that of Virginia (§ 2902 Code of Va.) and Florida (Gen. Stats. of Fla. 1906, §§ 3145, 3146) respectively, was a death statute. Spradlin v. Ga. Ry. & Elec. Co., 139 Ga. 575, 77 S. E. 799; Florida C. & P. R. v. Foxworth, 41 Fla. 1, 25 So. 338; Duval v. Hunt, 34 Fla. 85, 15 So. 876. The precise question presented to us for decision was not discussed in either of the two above mentioned opinions, but an examination of the records and briefs in those

cases discloses the fact that in both of them the point was raised and necessarily decided by the respective courts. In re The Chiswick, supra, it was claimed that as the decedent died ashore the case was not within admiralty jurisdiction. It was argued that the Florida statute was a death statute (citing Tiffany, Death by Wrongful Act, § 24; Seward v. Vera Cruz, 10 App. Cas. 59, 67, by the House of Lords, Whitford v. The Panama Railroad Co., 23 N. Y. 465; Matter of Meekin, 164 N. Y. 145; Seaboard A. L. R. Co. v. Mosley, 60 Fla. 186; Florida E. C. R. v. Jackson, 65 Fla. 393; Duval v. Hunt, 34 Fla. 85, supra; Florida C. & P. R. v. Foxworth, 41 Fla. 1, supra). Counsel contended as follows:

> "* * * the widow's cause of action is not for the wound inflicted on the decedent on the ship, but for the death of the decedent, which took place on the land.
>
> "This is a new cause of action, which the decedent never had. The widow's damages did not arise until the death occurred. The substance and consummation of the widow's cause of action arose on the land, and therefore were beyond the jurisdiction of the admiralty court."

In support of this contention in that case the appellant cited Ex parte Phoenix Ins. Co., 118 U. S. 610; Johnson v. Chicago and Pacific Elevator Co., 119 U. S. 338; Cleveland Terminal R. R. Co. v. The Steamship Co., 208 U. S. 316; The Plymouth, 3 Wall. 20; Ryley v. Philadelphia R. R. Co., 173 Fed.

839. The last two cases are relied upon by appellee in the case at bar. It follows that the decision of the Circuit Court of Appeals of the fifth circuit that the court of admiralty had jurisdiction is a direct determination of the question involved in the case at bar. In the decision by the Circuit Court of Appeals for the fourth circuit (The Anglo-Patagonian, 235 Fed. 92, supra), the main contention of the parties as to jurisdiction arose from the fact that the ship was in dry dock, hence it was contended that neither the injury nor the death ashore resulting therefrom occurred within admiralty jurisdiction. The fact that the injured workman was taken ashore and died there, was not stressed in the briefs, although in the appellant's reply brief, it was said:

> "Section 2902 of the Code, quoted on page 17 of appellee's brief, in connection with the libel on behalf of Byrd, is Virginia's Lord Campbell's act, and the general rule and the law as stated in 'The Glendale' is not controverted.
>
> "While giving a lien, however, it is not for a cause of action which survives, but is a new cause of action entirely.
>
> "In discussing this provision the Supreme Court of Appeals said:
>
> " 'It *is not* (sic) intended to withdraw from the wrongdoer the immunity from civil liability which the rule of the common law afforded him, and to provide for the recovery of such dam-

ages, notwithstanding the death of the injured person. In so doing, however, it plainly did not intend to continue or cause to survive his right of action for the injury, but to substitute for it and confer upon his personal representative a new and original right of action. (Citing cases.) * * * If the effect of the statute is, as was contended, to cause the right of action to survive, the suit by his personal representative would be to recover damages for the injury the deceased had sustained and the detriment caused to his estate. * * * But in a suit by the personal representative under the statute the evidence would primarily relate to and the damages be not only for the pecuniary loss the wife, husband, parent or child had sustained, but it would be proper for the jury * * * to take also into consideration the grief and mental anguish of such relatives and their loss in being deprived of the care, attention and society of the deceased.' Anderson v. Hygeia Hotel Co., 92 Va. 687, 691, 692.

"Byrd's administrator therefore is suing, not for the injury received by Byrd, but for damages for his death. The 'substance and consummation' of his wrong occurred at the hospital, and the decision in Ryley v. R. R. Co., 173 Fed. 839, passing, as it does, upon a statute of exactly the same character, is identically in point."

In considering the jurisdiction of a court of admiralty under the circumstances it should be remem-

bered that neither at common law nor by the general maritime law was there a right to recover for death (Rundell v. La Campagnie Generale Transatlantique, 100 Fed. 655; Ins. Co. v. Brame, 95 U. S. 756; The Alaska, 130 U. S. 201; The Harrisburg, 119 U. S. 199), and that admiralty courts having jurisdiction of cases resulting in death have adopted the more humane course of following the law of states, or nations, permitting such recovery where applicable. There seems to be no good reason why in admiralty there should be a jurisdictional distinction between the two types of statutes permitting recovery for death where the injury from which the death results occurs on board ship and within admiralty jurisdiction. Statutes of states and nations providing such a remedy have been applied by courts of admiralty in the interests of humanity. If this is the true basis for admiralty jurisdiction there is no broad ground for making the distinction between the two types of statutes in question. The circumstances are identical in each case. It is true that in determining questions of jurisdiction fine distinctions are very often made and are frequently determinative of the question, but there seems to be no good reason for such a distinction here, particularly as the law applicable aboard ship where the injury occurs is the same as that ashore where the injured man died.

Decree of dismissal reversed.

NETERER, District Judge:

I think the order of dismissal should be affirmed.

The libelant seeks to recover damages for death, under the Oregon statute. Sections 51-601 and 5-703, Oregon Code Annotated, are involved:

> "51-601. Claims giving rise to liens—Every boat or vessel used in navigating the water of this state or constructed in this state shall be liable and subject to a lien:
>
> 1. For wages due to persons employed, for work done or services rendered on board of such boat or vessel.
>
> 2. For all debts due to persons by virtue of a contract, expressed or implied, with owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel, on account of labor done or materials furnished, by mechanics, tradesmen, or others in the building, repairing, fitting and furnishing, or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of launchways constructed for the launching of such boat or vessel.
>
> 3. For all sums for wharfage, anchorage, or towage of such boat or vessel within this state.
>
> 4. For all demands or damages accruing from the non-performance or mal-performance

> of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of the boat or vessel on which such contract is to be performed, *and for damages or injuries done to persons or property, by such boat or vessel resulting in the death of any person.*" (Italics supplied.)

All liabilities are personal to the vessel. No action is created in favor of next of kin or legal representatives in case of death, to give admiralty jurisdiction. The decedent, at death, had no personal relation to the ship. This statute does not give a libel in rem against the vessel for damages (The Osceola, 189 U. S. 158), nor to the next of kin, or legal representatives. It is not a "survival statute." Process in rem is founded upon a right in the ship (the estate has no right), and the object of process or attachment is to obtain the vessel. A suit in rem cannot be maintained without service of process on the vessel, and admiralty is impotent to direct process where no right of action in admiralty exists and no lien exists by statute in favor of the suitor. Nor does the "death act"

> ("5-703. Death from injury, when representatives may sue—Statute of limitations—Amount of recovery—When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have

> maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $10,000 and the amount recovered, if any, shall be administered as other personal property of the deceased person." Sec. 5-703, Oregon Code Annotated.")

by libel in rem or attachment in aid; nor did the right give remedy of action accrue until death on land. This latter act is distinguished from a "survival act" in which action accrues on the vessel and survives to the next of kin, or whomsoever the statute nominates, and admiralty attaches at injury, although death occurs on shore; and no survival right is given by Sec. "51-601," supra.

The lien or privilege sought to be impressed is not founded on any rule of maritime law, but upon a created right by state statute, and if the right is non-existent, the libel fails.

The origin of admiralty regulation of navigation and commerce was the power of the admiral. Anciently, he was a great officer, governed the navy and adjudicated all maritime matters, and his power in navigation and commerce extended over the navigable waters to all parts of the world. The origin is in doubt, probably Asiatic, unknown in Europe before the time of the Holy Wars. The admiral judged all matters relative to merchants and mariners pursuant to law of Oleron, which was taken,

so far as it was available, from the Rhodian law, which was promulgated about 70 years after the reign of Solomon, king of Israel. Justice Holmes in The Blackheath, 196 U. S. 361, 365, said: "The precise scope of admiralty jurisdiction is not a matter of obvious principle or very accurate history." The autocratic power of the admiral by long period of melioration and unfolding through development of common rules of principles and usage which grew out of conduct and habits of those engaged in maritime commerce, found expression in the equitable system of admiralty law now in force among the nations. Each nation has its admiralty rules and law. The Supreme Court in The Lottawanna, 88 U. S. 558, at 572, said:

> "Maritime law can hardly be said to have a fixed and definite form as to all the subjects embraced within its scope * * *. No nation regards itself as precluded from making occasional modification suited to its locality and the genius of its own people and institutions."

The written rule, no doubt, first found expression after the need was established by rules and principles, usages, developed by the conduct and habits of those engaged in traffic on the sea, suited to people in definite localities and special institutions. Our admiralty rules and law are dependent on laws of the United States (The Lottawanna, supra; The Elfrida, 172 U. S. 186); and rights or liens created by state statute in favor of the suitor, are administered in admiralty.

The admiralty extends to the high seas, and also to navigable rivers, whether tidal or not (The Moses Taylor, 71 U. S. 411; 4 Wall.), and to rivers and lakes which are highways of commerce (The Daniel Ball, 79 U. S. 557; 10 Wall.), not to a river not of itself a highway for interstate or foreign commerce.

The Constitution of the United States, Art. 3, Sec. 2, Par. 1, grants judicial power to the United States District Courts in all cases of admiralty and maritime jurisdiction. Originally, the admiralty jurisdiction was but another phase for the power of the admiral, next in power to the monarch, and extended to non-admiralty cases "beyond the sea." The ancient and time honored privilege of admiralty (Edward's Ad. Juris. 17), Smart v. Wolf, 3 T. R. 348, does not obtain under our Constitution. English Stat. 2, Henry IV, c. 2, provides: "* * * Admirals shall not intermingle anything done in the realm but only of a thing done upon the sea." The added word "maritime" in our law restricts admiralty to maritime service. In The Eclipse, 135 U. S. 599, at page 608, the court says: "The jurisdiction embraces all maritime contracts * * * and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts and services purely maritime * * *." And by the same token, the like grants and restrictions apply to torts.

A maritime lien is a necessary basis for an admiralty proceeding in rem, and may be prosecuted in any district where the offending vessel is found.

The Propeller Commerce, 66 U. S. 574 (1 Black). No right of action is given, or lien created, to the next of kin, or legal representatives, in the instant case. It is a claim for a secret lien and would operate to the prejudice of the general creditors, and is stricti juris, and not to be extended by construction, analogy or inference. Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U. S. 490. A maritime lien can be effected only by act of Congress, state statute or by visible contact with, or occurrence relating to, the service of the ship, and must be a manifest and open, ocular, physical endeavor of maritime service or liability which may serve as notice to the world of an existing claim. The principle of hypothecation is the basis of a maritime lien, and the hypothecation can not apply upon a secret agreement between the owners, nor can a lien apply for tort resulting in death, under the Oregon statute, no lien existing or libel in rem given to next of kin or legal representatives of deceased, death not occurring on the ship. Until death on land there was no cause of action. When death occurs on the ship, the act is open and obvious, and the lien is effective. But when the injury occurred on the ship, no lien being created against the ship by the Oregon statute for the loss by death to next of kin or his estate, death following upon the land, an enforceable right of action was created in the state court. Cordray v. Bee, 102 Or. 636.

The ship has a personality of her own, is bound by her contracts and is liable for her obligations and

her torts. Tucker v. Alexandroff, 183 U. S. 424. But not for the tort to others, unless made so by statute.

The Supreme Court in The Harrisburg, 119 U. S. 199, held that in the absence of an act of the Congress or state statute giving a right of action therefor, admiralty has not jurisdiction to award damages for death of a human being on the high seas for negligence. The admiralty court is a court of limited jurisdiction and has such powers only as are conferred by the Constitution and laws. No discretion is vested in the exercise of admiralty jurisdiction; nor can the admiralty court concern itself as to the policy of different types of statutes permitting recovery for death, where injury results. The Oregon statute creates a right, but not to the next of kin or estate by "survival act," nor does it prescribe a remedy to enforce the right by libel in rem and give admiralty jurisdiction by creating a lien for death either on or off the ship through negligence on the ship to the injured's estate or next of kin. The distinction between the several types of statute is a matter for the Congress (Turner v. Bank of N. A., 4 Dall. 10; Case Sewing Machine Companies, 85 U. S. 553 (18 Wall.)), or the several states by statute creating a lien or giving libel in rem to named parties.

The law of the sea which embodies principles of the general admiralty law was in existence during the Confederation, and was by the Constitution given national control and recognized as the law of the United States, subject only to Congress to sup-

plement and modify (The Allianca, 264 U. S. 375) and liens created by state statutes. The Lottawanna, supra; Edwards v. Elliott, 88 U. S. 532 (21 Wall.); The Robert W. Parsons, 191 U. S. 17; The Glide, 167 U. S. 606. The power and limited jurisdiction of admiralty courts is discussed in Krauss Bros. Lumber Co. v. Dimon SS. Corp'n, 53 Fed. (2) 493, and in The New Moon, 55 Fed. (2) 929; and The Alaska, 225 Fed. 643. Some statements are here repeated and much of what was there said with relation to the development and history of admiralty and the jurisdiction of admiralty courts, has application here, except that the interpretation of the Oregon law by the highest court of the state must be accepted by this court. N. P. Ry. Co. v. Meese, 239 U. S. 614; Truckee River Gen. Elec. Co. v. Benner, 211 Fed. 79. No cases are cited which, to my view, have any application to afford a basis for reversal. It is admitted that Sec. "5-703" has been adjudicated by the highest court of Oregon a "death statute."

The Anglo-Patagonian, 235 Fed. 92, is concluded by Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft v. Gye, 207 Fed. 247. In this case, at page 253, the court said:

> "We deem it unnecessary, in view of the conclusion reached on the merits, to advert to the question of jurisdiction more than to say that it is well settled by the weight of modern authority that the locus injuriae is the test of jurisdiction. The Strabo, 98 Fed. 998; The Aurora, 163 Fed. 634."

The Anglo-Patagonian, supra, was a proceeding under the code of Virginia, section 2902, which provides: "The * * * vessel which would have been liable if death had not ensued * * * shall be liable to a libel in rem." This statute created a lien enforceable in admiralty. The Glendale, 81 Fed. 732. Not so the Oregon statute.

It is obvious that the Anglo-Patagonian, supra, sustains dismissal in The Kaian Maru, 2 Fed. (2) 121. While the libel in The Anglo-Patagonian, supra, was predicated on the state statute giving libel in rem, the court based its conclusion upon The Strabo, 98 Fed. 998, which was an action for an injury sustained by a person descending from a ship to the wharf by means of a ladder negligently left unfastened to the rail of the vessel, it having slid along the rail while he was descending and libelant was thrown upon the wharf and injured. The decisive issue was the "insecurity" of the ladder upon the ship. The ship in that case was liable in rem under the maritime law, and the court said: "The important question in the case is that of the jurisdiction of a court of admiralty over a tort caused by the negligence of the master upon the navigable water in regard to the security of the ladder upon the ship, and the known injurious consequences having been suffered by the fall upon the landing * * *," and the court held that the wrongful agency took effect on the ship, and the libelant was hurled from his position on the ship, and before he reached the dock he was subjected to conditions inevitably

resulting in physical injury, and the ship was liable, wherever he finally struck; and the issue now before the court was not involved. The court held that the ship in that case in any event was liable in rem under the maritime law. The insecurity of the ladder, the descent on the ladder and the fall were one act, the inevitable result was on the ship, and right of action obtained under the maritime law.

The Chiswick, a per curiam decision, was based on Sec. 3145, Gen. Compiled Laws of Florida, 1906, but enacted in 1883, which gives right of recovery of damages for death negligently produced; and by the following section (3146) this right of action is made to survive.

No cases are cited in support of the "opinion" of the court for the simple reason that there are none, nor is the conclusion to me supported by reason, and, it seems, is against reason and precedent and should not be followed by this court. The Samnanger, 298 Fed. 620, held that a state statutory right of action for death on navigable water, where no libel in rem is given or lien created, does not give admiralty jurisdiction. See, also, The Plymouth, 70 U. S. 20 (3 Wall.); Pickles v. Leyland, 10 Fed. (2) 371.

Hughes on Admiralty, says, under the survival act, the right of action is consummated when the fatal injury is inflicted, and in the death act, right of action is not consummated until death; that in the one, admiralty has jurisdiction for the fatal

injury invoked on the vessel, though death occurred on land, while in the "death act," there was no cause of action until death, although the injury was inflicted upon the vessel, and death occurred on the land, and in the latter case, admiralty has not jurisdiction. Hughes on Admiralty (2nd Ed.), pp. 234-6.

It may also be suggested that while maritime law may be changed, the Supreme Court in The Lottawanna, supra, held that the courts cannot change the law; they can only declare it, and if a change is desired, it must be by the legislative department of the government.

The case of Uravic v. Jarka Co., 282 U. S. 234 (162 N. E. 13); 75 L. E. 182, which was an action as to the applicability of the Jones Act, as amended by Act June 5, 1920 (title 46, sec. 688, U. S. C. A.), has no application here.

I think from any and every viewpoint the judgment should be affirmed.

[Endorsed]: Opinion and dissenting opinion. Filed August 15, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6698.

THERESA RICE, Administratrix of the Estate of Vincent Catino, Deceased,

Appellant,

vs.

VANCOUVER STEAMSHIP COMPANY, LTD., a Corporation, claimant of the Steamship "City of Vancouver," etc.,

Appellee.

DECREE.

APPEAL from the District Court of the United States for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon, and was duly submitted:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed with costs in favor of the appellant and against the appellee.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellant recover against the appellee for her costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered August 15, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Erskine Wood, counsel for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including October 10, 1932; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WM. H. SAWTELLE,
United States Circuit Judge.

Dated, San Francisco, California, September 3, 1932.

[Endorsed]: Filed Sep. 3, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-seven (47) pages, numbered from and including 1 to and including 47, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of proctor for the appellee and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 19th day of September, A. D. 1932.

[Seal] PAUL P. O'BRIEN,
Clerk.

In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Order Staying Issuance of Mandate—Filed Oct. 5, 1932

Upon application of Mr. Erskine Wood, proctor for the appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including November 1, 1932; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Wm. H. Sawtelle, United States Circuit Judge.

Dated San Francisco, California, October 5, 1932.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

Supreme Court of the United States

Order Allowing Certiorari—Filed December 5, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 469

FILED
OCT 24 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

VANCOUVER STEAMSHIP COMPANY, LTD.,
a Corporation,
Petitioner,

v.

THERESA RICE, Administratrix of the Estate of
Vincent Catino, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ERSKINE WOOD,
Counsel for Petitioner,
1310 Yeon Building, Portland, Oregon.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Vancouver Steamship Company, Ltd., relying upon Title 28, Sec. 347, U. S. C. A. (Sec. 240 of the Judicial Code) to sustain the jurisdiction of this Court, respectfully shows to this Honorable Court as follows:

The petitioner is a corporation of British Columbia and is the owner of the steamship "City of Vancouver." While that ship was loading in the Columbia River at Westport, Oregon, on December 1, 1929, a longshoreman, Vincent Catino, was injured on shipboard, carried ashore, and died ashore one hour later. He was not an employee of the ship, but of the contracting stevedores who were loading her. Subsequently Theresa

Rice, the respondent, was appointed administratrix of his estate, and filed a libel against the ship in rem in the District Court of the United States for the District of Oregon. Your petitioner appeared in that case and claimed the ship as owner, and excepted to the libel on the ground that the admiralty court was without jurisdiction. The point of the exception is this: The Oregon "death statute", under which the suit was brought, is not a "survival act" and no right of action arises under it until death actually occurs; and, death occurring, the right which the injured man had dies with him, and a new, distinct and different cause of action arises in the person of his administrator for the benefit of his estate; and, since in this case that new cause of action arose on land (death occurring ashore), and the tort and damage were thus consummated there, the admiralty court was without jurisdiction. The exception was sustained by the District Court and a decree entered dismissing the libel. R. 14. From this decree libelant appealed to the Circuit Court of Appeals for the Ninth Circuit and that court, one judge dissenting, reversed the decree of the District Court and held that the admiralty had jurisdiction. R. 29-35. This was a final determination of the point involved, and is the only error relied on. The date of the opinion of the Circuit Court of Appeals was August 15, 1932, and the mandate has been stayed pending the filing of this petition.

Since we believe the question can be better presented to your Honors by incorporating shortly in the petition itself our reasons therefor, rather than in an accompaning brief, we adopt that course. And, as the doctrine we contend for and the ground underlying it are clearly and succinctly stated by Hughes in his

work on Admiralty, we begin by quoting what he there says:

"*Fatal Injury on Water—Death Ashore.*

"In discussing the bounds of amiralty jurisdiction in tort, it has been seen that where the cause of action is consummated on the water, admiralty has jurisdiction, though additional injuries immediately following on land may aggravate the damages, and that on the other hand, where the cause of action is consummate only on land, admiralty has no jurisdiction, although the injury originated on water.

"The application of this doctrine to the case of a person injured fatally on a ship, but not dying till after he has been carried ashore, depends—or ought to depend—on the character of the state statute giving the right.

"It is well known that state statutes giving this right of action fall under two classes. One class recognizes the right of the deceased to sue for the injury inflicted, and provides that such right of action, vesting independent of statute in the deceased, shall survive, thus simply abolishing the common-law rule that a personal right of action dies with the person. The Massachusetts and Louisiana statutes may be taken as types of this class, and these are called 'survival acts.'

"Another type gives an entirely new right of action to the parties injured by the death, such as dependents, for the loss to them by reason of the death, independent of any right of action to the deceased. Lord Campbell's Act in England, which was the prototype of these statutes, and the Virginia statute, are good illustrations of this type. These are usually designated as 'death acts.'

"It is obvious that under a survival act the right of action is consummate when the fatal injury is inflicted, and that the subsequent suffering and death are only cumulative.

"It is equally obvious that under a death act the right of action is not consummate till death occurs."

"Hence, in a case arising under a survival act, admiralty ought to have jurisdiction, though the death occurred on land.

"And in a case arising under a death act, admiralty ought not to have jurisdiction, where the death occurred on land.

"Accordingly, in Ryley v. Philadelphia & R. R. Co., Judge Adams held that admiralty had no jurisdiction in a case turning on the Pennsylvania statute (a death statute) where the injured party died on shore.

"And in Hamburg-Amerikanische Packetfahrt Aktien Gessellschaft v. Gye, the Circuit Court of Appeals for the Fifth Circuit held, in a case arising under the Louisiana statute (a survival statute), that there was jurisdiction.

"This case was followed in the Anglo-Patagonian by the Circuit Court of Appeal for the Fourth Circuit, in a case arising under the Virginia statute (a death statute), overlooking the radical difference between the Louisiana and Virginia statutes." *Hughes on Admiralty*, 2nd Ed., pp. 234-236.

Since the Oregon statute is conceded on all hands to be a "death statute" and not a "survival act," and has been frequently so interpreted by the Oregon Supreme Court, Judge Robert S. Bean of the United States

District Court for Oregon followed Mr. Hughes in the *"Kaian Maru,"* 2 Fed. (2d) 121. He there said:

> "The action is brought under section 380 of the Oregon statute, which has been construed by the Supreme Court of this state to be a death and not a survival statute. In other words, the original injury does not survive to the executor. The action authorized by the statute is for a death, to recover the damages resulting to an estate, and therefore, as the cause of action upon which this suit is based arose on land, and not on water, the authorities seem to be that an admiralty court has no jurisdiction. In cases where the cause of action by statute survives, an admiralty court would, under those circumstances, have jurisdiction, because, if an injury occurs on water and is aggravated by subsequent acts on land, it does not deprive the admiralty court of jurisdiction over the case; but where the cause of action arises on land an admiralty court has no jurisdiction. In this case the cause of action did arise on land, because it is for the death of the decedent, and not for the injury that he received aboard the boat. I conclude, therefore, that an admiralty court is without jurisdiction." *The Kaian Maru*, 2 Fed. 2nd 121.

This decision of Judge Bean has been the accepted law in Oregon until the present decision of the Circuit Court of Appeals in the instant case.

In *Ryley v. Philadelphia R. R. Co.*, 173 Fed. 839, one of the cases referred to by Mr. Hughes, Judge Adams in the Southern District of New York, in a case identical with the present one, said:

> "In the admiralty it has become well settled that where damages or death occur, it is not sufficient

that the wrong originated upon the water. If it was not consummated upon the water, jurisdiction does not exist." Citing the Plymouth, 3 Wall, 20, 34; 18 L. Ed. 125. And concluded: "This has been followed in numerous cases and may be regarded as settled law." pp. 841-842.

We do not quote his opinion at length, but commend it for its very apt and concise quotations from other pertinent cases.

Rundell v. LaCampagnie Generale Transatlantique, 100 Fed. 655, is a decision of the Circuit Court of Appeals of the Seventh Circuit, and therefore important as illustrating that the Circuit Courts of Appeals are not in agreement on this question. In that case Rundell's intestate was drowned at sea in the wreck of the French ship "La Burgoyne." It was admitted that the admiralty law gave no right of action for death upon the high seas, but was contended that the law of the French flag, which did give such right, extended beyond the rail of the ship and covered drowning caused by a wrong originating on the ship herself, namely, faulty navigation. The court refused to accept this contention and held that the faulty navigation was *damnum absque injuria*, that no right of action arose until death occurred, and that, since death occurred beyond the boundaries of the ship, the law of the flag was of no avail. The substance of the opinion is in the following quotation therefrom:

> "*The locus of the tort, therefore, which must always be determined by the place where the injury and damage arise, rather than where the negligent act is committed*, must be considered as being upon the high seas, rather than upon French territory, supposing that the flying of the French flag made

the vessel French territory while upon the high seas, as is claimed. *The place where the death occurred and the damage arose must be held to be the locus in quo. The damage is the substance and consummation of the injury, and from that alone springs the right of recovery.*" (Citing the Plymouth and other authorities.)

The latest death case we have found is *Pickles v. Leyland*, 10 Fed. (2d) 371, where Judge Lowell in the Massachusetts District followed Judge Bean in the "Kaian Maru," and said, significantly, on page 372:

"As to Hamburg-American Packet Co. v. Gye, 207 F. 247, 124 C. C. A. 517, and The Anglo-Patagonian, 235 F. 92, 148 C. C. A. 586, see Hughes, Admiralty, 2nd Ed. p. 236."

Judge Brown of the Southern District of New York has always been recognized as one of the great admiralty judges of the country. He said in the "*City of Lincoln*," 25 Fed. 835:

"In every action for a tort of this kind there must be both negligence and damage; neither alone constitutes a cause of action. If the negligence originates in one place, and the damage is sustained in another, some rule is necessary in order to determine the *locus* of the tort. The supreme court, in the case of The Plymouth, 3 Wall 26, and in other cases, have adjudged that the criterion is the place 'where the substance and consummation of the injury' are effected. So in 1 Hawk. P. C. c. 37, Sec. 17, it was decided that where A., standing on the shore of a harbor, fired a loaded musket at a revenue cutter, which had struck upon a sand-bank, in the sea, about 100 yards from the shore, by which firing a person

was maliciously killed on board the vessel, it was piracy; for the offense was committed where the death happened, and not at the place from whence the cause of death proceeded." pp. 836-837.

Of course, there are many other cases announcing the doctrine that where the origin of the wrong is on the water, but the wrong is consummated on the land, admiralty has no jurisdiction; and, conversely, where the wrong originates on the land and is consummated on the water. A few of such cases are:

The Maud Webster, 8 Benedict, 547.
The Mary Garrett, 63 Fed. 1009.
Herman v. Port Blakeley Mill Co., 69 Fed. 646.
City of Milwaukee v. The Curtis, 37 Fed. 705.

In many of these cases the decision of this court in The Plymouth is cited. In that case fire, originating on the ship, was communicated to warehouses on land, and destroyed them. This wrong was held not cognizable in admiralty. The case is reported in 70 U. S. 20; 3 Wall 20; 18 L. Ed. 125. At page 128 of the Lawyers Edition, Mr. Justice Nelson, speaking for the court, said:

"We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters—the Chicago river; and, as we have seen, the simple fact that it originated there, but, the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action; it

is *damnum absque injuria*. The case is not distinguishable from that of a person standing on a vessel, or on any other support in the river, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and destroyed. That would be a direct act of trespass; but quite as efficient a cause of damage, as if the fire had proceeded from negligence. Could the admiralty take jurisdiction? We suppose the strongest advocate for this jurisdiction would hardly contend for it. Yet, the origin of the trespass is upon navigable waters, which are within its cognizance. The answer is, as already given; the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends—on the high seas or navigable waters."

Opposing these authorities which we have cited, the Circuit Court of Appeals in the majority opinion in the present case cites and relies upon two cases, The Anglo-Patagonian, 235 Fed. 92, and the Chiswick, 231 Fed. 452. And importance is rightly given to these two decisions because they are both decisions of Circuit Courts of Appeals. The Anglo-Patagonian was decided in the Fourth Circuit under a Virginia statute, and the Chiswick in the Fifth Circuit under a Florida statute. The majority opinion concedes that in neither of these cases was the precise point discussed. The Chiswick was a mere *per curiam* decision, the court saying only: "All the judges agree that the cause of action arising on the steamship 'Chiswick' was a maritime tort, and as it resulted in death of said Clarke within twenty to thirty minutes after his removal from the ship, the right to recover damages for such tort given by Sec. 3145, Gen. St. Fla. 1906, could be enforced, and relief given in admiralty." But even this,

meager as it is, is no authority for the court's position for, as Judge Neterer has pointed out in his dissent in the present case, the Florida statute is really a "survival act"; the right of action, given in Sec. 3145 of the Florida statutes, being by Sec. 3146 (not mentioned in the court's opinion at all) made to survive.

The error of the Anglo-Patagonian has been pointed out by Mr. Hughes in his text already quoted. The court there followed the Gye case, 207 Fed. 247, a "survival act" case, without noticing that the Virginia statute was a "death act," and without perceiving the distinction between the two.

These two cases and the "interest of humanity" are the only reasons relied on by the majority for its present opinion. We have pointed out the weakness of the cases, and, as for the interests of humanity, we say, with all due respect for the majority opinion, "humanity" cannot create a jurisdiction where it does not exist. Judge Wilbur, in writing the majority opinion, says that the admiralty courts, recognizing the deficiency of the admiralty law in not giving a right of action for wrongful death, have adopted the more humane course of "following the law of states or nations permitting such recovery where applicable." That is true, and that is what they have done. But the point is they *have* "followed the law of the states" and taken that law as they found it in the different states. Necessarily so. They could not adopt the law of the state, and then make it something different from what is was. They had to take it with its benefits and its burdens. So, where the admiralty adopts a state statute and attempts to enforce it, it has to adopt the state statute of limitations along with it. And where the state statute makes contributory negligence an absolute bar, the admiralty, if it adopts that state statute, has to depart from its own rule that contributory negligence

divides the damages, and to accept, instead, the state rule of an absolute bar. Now, in the instant case, the majority opinion has not "followed the law" of the State of Oregon at all. It has first adopted the state law to try to help out the admiralty jurisdiction, and then, to complete the process, has made the state law something entirely different from what it really is. The court itself concedes that the Oregon statute is a "death act," and then immediately, "in the interests of humanity", turns it into a "survival act" in an attempt to sustain its jurisdiction. This, we think it clear, it cannot do.

In this connection it should always be remembered, as Judge Neterer has pointed out in his dissent, that, since this is a proceeding against the ship in rem, which must rest for its base upon a maritime lien or hypothecation, the court, by its majority opinion, is attempting to extend and create a maritime lien in a case where it does not exist; and, as this court had occasion to say in *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490, the maritime lien is "*stricti juris* and cannot be extended by construction, analogy or inference."

As far as the "interests of humanity" go, if that, in any event, could be a ground for creating a jurisdiction which does not exist, they are not present in this case. If there are any next of kin or dependents of the dead man, they could have been, and still can be, amply compensated under the Longshoremen's and Harbor Workers' Compensation Act; whereas any proceeds from this case would go to the estate; and we assume it is that fact which has induced the administratrix to speculate upon this litigation.

The majority opinion in its opening sentences, in speaking of the Kaian Maru, refers to the "death

statute" of Oregon as "a statute permitting the relatives to recover for injuries they suffer by reason of the death of a decedent." This was probably an inadvertence. At any rate, to avoid any misunderstanding, let us point out that the Oregon death act does not permit the *relatives* to recover for the injuries to the deceased. It only permits the personal representative to recover for the damages to the estate. Oregon Code Annotated, Section 5-703.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

The question presented is one of admiralty jurisdiction, and therefore important to be settled. The Circuit Courts of Appeals, as well as the District Courts, are in disagreement about it. The decision of the Circuit Court of Appeals for the Ninth Circuit in the present case is contrary to the decision of the Circuit Court of Appeals for the Seventh Circuit in *Rundell v. LaCampagnie Generale Transatlantique*, 100 Fed. 655. The decisions of the Circuit Court of Appeals for the Fifth Circuit in the Chiswick, already cited, and of the Circuit Court of Appeals for the Fourth Circuit in the Anglo-Patagonian, already cited, though shown, as we think, to be faulty in their reasoning, which proceeded from a failure to perceive the essential character of the state statute, nevertheless are some authority for the position taken by the Ninth Circuit in this case; which, as already shown, is different from the position taken by the Seventh Circuit.

Because of this difference in authorities, and the necessity for settling for the whole country this important question of jurisdiction your petitioner respectfully prays that this Court will issue its writ of certiorari to the United States Circuit Court of Ap-

peals for the Ninth Circuit, commanding that Court to certify the record in this cause for review and decision by this Court of the question involved.

And your petitioner will ever pray.

Erskine Wood

ERSKINE WOOD,
1310 Yeon Building,
Portland, Oregon,
Attorney for Petitioner.

Dated October 17, 1932

I, Erskine Wood, hereby certify that the foregoing petition is in my opinion well founded in law, and not interposed for delay.

Erskine Wood

ERSKINE WOOD.

FILED
FEB 9 1933
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 469

VANCOUVER STEAMSHIP COMPANY, INC.,
PETITIONER,

vs.

THERESA RICE, ADMINISTRATRIX OF THE ESTATE OF VINCENT CATINO, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENT.

ARTHUR I. MOULTON,
WM. P. LORD,
Counsel for Respondent.

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BRIEF OF RESPONDENT.

Statement.

Libelant's intestate, Vincent Catino, was a longshoreman by occupation, and on December 1, 1929, Catino was in the employ of the Astoria Stevedoring Company and was working for that company in load-

ing the S. S. "City of Vancouver," a vessel of British registry. This vessel was berthed at the lumber dock at Westport and lying in navigable waters of the Columbia River. This company had a contract for the loading of the ship, and particularly agreed to stow the cargo in the cargo spaces of the vessel through the services of longshoremen in its employ. It was agreed between the owners of the ship and the stevedoring company that the owners would furnish the loading machinery and maintain it in seaworthy condition and maintain it in such condition during the loading. In other words, for the purposes of this case, it may be assumed that there was an independent contract between the parties.

It is charged in Article II of the Libel that "Vincent Catino, libelant's intestate, was engaged in his said work in loading said steamship and was standing on the deck of said steamship near a hatch, and a sling load of lumber was being hoisted from said dock over the deck of said steamship, and while said load was being so hoisted and was over the deck of said steamship, the winch carrying said load suddenly lost its purchasing power, and said load fell toward the deck, striking libelant's intestate, and so crushing him that he was mortally injured, while engaged in said employment, and while said vessel was lying in the waters of the Columbia River, and thereupon the said sling load of cargo was removed from the body of said Vincent Catino and at said time said Vincent Catino was bleeding internally, and was so unconscious from said injury that he did not know or comprehend the nature of any act, and thereupon said Vincent Catino

was placed on a stretcher and removed to an emergency hospital in the village of Westport or thereabouts, and one hour thereafter, without regaining the possession of his faculties, said Vincent Catino expired."

The particular negligence charged was that a wedge or key which held the winch in gear was old and rusty and as a result would not hold. It was the duty of the owners, acting through the officers and crew, to maintain the key in a seaworthy condition, and by reason of the defect the winch came out of gear while hoisting a load over the deck. Libelant, who is the appointed administratrix of the estate of the deceased, brought this proceeding to recover damages in the sum of $10,000.00 for the death of the deceased.

It is further alleged that libelant elected to sue the third party liable in accordance with the right of election provided for in the Longshoremen's and Harbor Workers' Compensation Act.

The Vancouver Steamship Company, Ltd., a Canadian corporation, filed exceptions on the ground that the libel did not state a cause of suit in admiralty, and these exceptions were sustained by the court, and judgment of dismissal was entered upon libelant's refusal to plead further.

The trial court sustained exceptions to the libel following the decision of the Kaian Maru, 2 Fed. (2d) 121, a case holding that a claim of this character could not be maintained in admiralty and a case which was not argued before the trial judge on the part of the libelant. The case was appealed to the Circuit Court

of Appeals and the decree was reversed by that court holding:

> "In considering the jurisdiction of a court of admiralty under the circumstances it should be remembered that neither at common law nor by the general maritime law was there a right to recover for death (citing cases), and that admiralty courts having jurisdiction of cases resulting in death have adopted the more humane course of following the law of states, or nations, permitting such recovery where applicable. There seems to be no good reason why in admiralty there should be a jurisdictional distinction between the two types of statutes permitting recovery for death where the injury from which the death results occurs on board ship and within admiralty jurisdiction. Statutes of states and nations providing such a remedy have been applied by courts of admiralty in the interests of humanity. If this is the true basis for admiralty jurisdiction, there is no broad ground for making the distinction between the two types of statutes in question. The circumstances are identical in each case. It is true that in determining questions of jurisdiction fine distinctions are very often made and are frequently determinative of the question, but there seems to be no good reason for such a distinction here, particularly as the law applicable aboard ship where the injury occurs is the same as that ashore where the injured man died."

Points and Authorities.

I.

An admiralty court will enforce against a vessel a lien for wrongful death created by a State statute.

The Anglo-Patagonian (C. C. A.), 235 Fed. 92, cert. denied 242 U. S. 637.

II.

If the fatal force to the deceased occurred on navigable waters and death occurred on shore, admiralty has jurisdiction.

Smith & Sons v. *Taylor,* 276 U. S. 179.

The Chiswick (C. C. A.), 231 Fed. 452.

The Samnanger, 298 Fed. 620.

Campbell v. *Luckenbach S. S. Co.,* 5 F. (2d) 674.

Liverani v. *Jno. T. Clark & Sons,* 176 N. Y. S. 725.

U. S. S. B. E. F. Corp. v. *Greenwald* (C. C. A.), 16 Fed. (2d) 948.

In Re Clyde S. S. Co., 16 Fed. (2d) 930.

Resigno v. *F. Jarka Co.,* 162 N. E. 16.

35 *Yale Law Journal,* 404, also at page 1007.

The Anglo-Patagonian (C. C. A.), 235 Fed. 92, 242 U. S. 637 (cert. denied).

Petition Clyde S. S. Co., 16 Fed. (2d) 930.

U. S. S. B. E. F. C. v. *Greenwald,* 16 Fed. (2d) 948.

III.

Oregon statutes create a liability in favor of the personal representative for wrongful death.

Sec. 5-703, O. C. A.

Sec. 51-601, O. C. A.

IV.

Furthermore, the Oregon statutes give a lien.

Sec. 51-601, Oregon Code Annotated.

Oregon Laws, 1911, Chapter 100, page 145.

The Corsair, 145 U. S. 335, 36 L. Ed. 727.

The Alaska, 225 Fed. 645.

V.

The striking of the deceased by a sling-load being hoisted by the winch was an act of the ship within the meaning of the statute.

Cordrey v. *The Bee,* 102 Or. 636, 201 Pac. 202.

The Bee (D. C.), 216 Fed. 709.

VI.

It has been frequently contended that where a person is injured in one State by negligence and dies in another State, an action for his death may be maintained in the courts of the former State under the death act thereof, since the cause of action given by that act is for the tort producing death and not for the death resulting therefrom.

Van Doren v. *Penn. R. Co.,* 93 Fed. 260.

9 Neg. & Comp. Cases, Annotated, 765.

ARGUMENT.

The issue framed in this case squarely presents the question whether a cause of suit to recover damages can be maintained in admiralty for wrongful death of a human being caused by a negligent act on shipboard, or more accurately stated by the failure to maintain the vessel in a seaworthy condition, resulting in death on shore, and this appeal involves this single question. It is admitted here that the deceased came to his death by a force or impact applied to his body while he was on a ship lying in navigable waters, and from that force he began bleeding internally, and before he was taken from the ship he had lost consciousness, and that he died one hour after the injury in an emergency hospital on shore.

It was held in *The Harrisburg*, 119 U. S. 199, that the absence of a Congressional Act or a State statute creating a right of action for wrongful death, a suit in admiralty could not be maintained to recover damages for the death of a human being caused by negligence, and all subsequent decisions have affirmed this statement of the law.

But in the State of Oregon, where this accident occurred, there is a death statute, as follows:

> "SEC. 5-703. *Death from Injury, When Representatives May Sue—Statute of Limitations—Amount of Recovery.*—When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have

> maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $10,000, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

Section 51-601 O. C. A. provides that every boat used in navigating the waters of this State shall be liable to a lien for damages done by such boat resulting in the death of any person. The entire statute is set out in Article IV of the Libel. It is contended by respondent, by virtue of these sections, that admiralty will enforce the lien given by the State statute for the death of the deceased. That Section 51-601 gave a lien against the vessel for wrongful death was decided in several cases:

The Oregon, 45 Fed. 62.
The Alaska, 225 Fed. (D. C.) 645.

In the latter case practically all the decisions construing the boat lien acts are discussed.

The Act was amended in 1911 to remove any doubt that its purpose was to create a lien for wrongful death, and the following was added to subdivision 4, "and for damages or injuries by such boat or vessel resulting in the death of any person."

This Court recognized that this statute did give a lien and that it was enforceable in admiralty. See *The Corsair*, 145 U. S. 335, 36 L. Ed. 727.

So it can be seen that the Oregon statutes have taken care of the inadequacy of a remedy in admiralty to re-

cover damages for wrongful death. But counsel says this cause of action is not for the original injury to the deceased received on shipboard, but the death which occurred on land that is provided for by the Oregon death statutes, and any claim that his personal representative has for the wrongful death is a non-maritime tort.

We have two answers to this contention. First, Section 51-601 O. C. A. merely gives a lien in the nature of an attachment and no reason exists why, if the cause of action alleged is non-maritime, a Federal court should not enforce the lien. See *Rounds* v. *Cloverport Foundry & Machinery Co.*, 237 U. S. 303. It makes no difference whether the tort was maritime or non-maritime. Admiralty will take the lien statute and enforce it in its court.

Second, the wrong causing the death of Catino occurred on the ship, and nothing took place on land that added one iota to what had taken place. As far as Catino was concerned, death had commenced from the moment that the load struck him, and taking him ashore to ameliorate his condition could not in reason mean that a new intervening cause had taken place which would give rise to new and different rights. The fatal impact had taken place and to contend that his personal representative had no rights to recover damages against this foreign vessel against whom no process could be secured in a common law action because he happened to expire on land, is depriving injured parties of all remedies against foreign owned vessels and giving such owners an advantage over

local owners which should not be tolerated. Such refinement of distinctions bring the law into disrepute and leave parties without remedy, if tolerated.

The rule supported by the weight of authorities is that the admiralty courts will enforce against a vessel a lien for wrongful death created by State statute if the fatal force was applied to the body of the deceased in navigable waters, although death from that fatal force happens on land and follows the rule adopted by the State courts that where one is injured in a State and moves to another State where death results from the original injury, an action may be maintained in the State where the wrong occurred producing his injury.

In the case of the *Anglo-Patagonian* (C. C. A.), 235 Fed. 92, certiorari denied 242 U. S. 637, a ship repairer was injured on shipboard and was taken ashore where he died from his injuries. A similar statute to the Oregon Act quoted was in effect in the State and the proceeding in admiralty was brought to recover damages for his wrongful death, and the court held that a proceeding in admiralty would lie to enforce the lien.

The court said:

> "Nor, as regards admiralty jurisdiction, can the cases of the workmen who were injured be distinguished from the case of the workman who was killed. The circumstance that Byrd was taken in an unconscious condition, and therefore without his knowledge or assent, from the dry dock, where he was hurt, to a nearby hospital, where he died shortly afterwards, cannot serve to defeat the jurisdiction which, as we hold, would have attached if his death had

occurred at the scene of the accident. On this question we follow with approval the decision of the Fifth Circuit Court of Appeals in *The Gye Case*, 207 Fed. 247, 124 C. C. A. 517, in which it is said:

'We deem it unnecessary in view of the conclusion reached on the merits to advert to the question of jurisdiction, more than to say that it is well settled by the weight of modern authority that the *locus injuriæ* is the test of jurisdiction. *The Strabo*, 98 Fed. 988 (39 C. C. A. 375); *The Aurora*, (D. C.) 163 Fed. 634.'

"In the Code of Virginia (section 2902) it is provided that 'The person who, or corporation or ship or vessel which, would have been liable if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel *in rem*'; and this court held in *The Glendale*, 81 Fed. 633, 26 C. C. A. 500, that the lien created by this local statute was enforceable in a federal court of admiralty. To the same effect, and also holding that injury to a stevedore, employed in discharging cargo, occasioned by a defective appliance furnished by the ship, constitutes a maritime tort, is the recent case of *The Chiswick*, 231 Fed. 452 (C. C. A.). In the light of the authorities cited, and others of a similar import, we think it clear that the plea of want of jurisdiction was rightly overruled."

In *Smith & Son* v. *Taylor*, 276 U. S. 179, a stevedoring company was unloading a vessel at a dock. Taylor, a longshoreman, was killed while employed on the wharf and was standing on a stage appurtenant to the dock and was struck by a sling load of cargo which was being lowered for him to receive, and which swung

over and struck him and knocked him off of the stage, and he was drowned. In an action to recover damages for his death, it was contended that the case fell within the maritime jurisdiction. It was admitted that the stage was an extension of the land, but it was admitted that the state law would apply if he had been killed by falling on the landing place, but it was contended that there was no claim made for injuries sustained while deceased was on land, and as the suit was only for death that occurred in the river, the case is exclusively within the admiralty jurisdiction:

> "Plaintiff in error concedes that the stage and wharf on which deceased was working are to be deemed an extension of the land (citing cases) and that the state law would apply if he had been injured or killed by falling on the landing place. It argues that as no claim was made for injuries sustained while deceased was on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction. But this is a partial view that cannot be sustained. The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death (citing cases). The substance and consummation of the occurrence which gave rise to the cause of action took place on land" (citing cases).

The contention that death on shore resulting from negligence on shipboard has its foundation in certain distinctions sought to be made by Mr. Hughes in his

work on Admiralty—a hornbook series—found in the second edition at page 235. Professors Macgruder and Grout, in an article in the February issue of the *Yale Law Journal* at page 395 of Vol. 35 of the *Journal*, in a carefully prepared text and note, reject the contention. The authors there say, at page 404:

> "Even though a particular state death act is admittedly applicable to the wrongful death, the *locus* of the injury must be examined to determine whether an action on such statute may be maintained in admiralty. As has been shown above, the 'wrongful act' for which the next of kin are afforded a right of action is the application of fatal force to the body of the victim. Therefore, if the fatal force is applied to the victim on land, the admiralty has no jurisdiction even though such force is put in motion by an initial act of negligence on navigable waters. Thus, if a hoisting derrick negligently operated on ship-board should let loose a bale of cotton which falls and kills a person standing on the wharf, the admiralty would have no jurisdiction. Conversely, if the fatal force is applied to the body of deceased on navigable waters, the admiralty would have jurisdiction, although the chain of causation was initiated by a negligent act on shore.
>
> "Likewise, if the fatal force is applied to the body of the deceased on navigable waters, the admiralty has jurisdiction even though the death occurs on shore. A learned writer has contended the contrary on the theory that 'the gist of the injury' to the next of kin is the death, and that if that death occurs on shore it is not a maritime tort; and there are a few decisions in

the district courts to this effect. But an impressive preponderance of authority, with the better reason, it is submitted, supports the admiralty jurisdiction in such a case. This view is supported also, by the numerous cases of fatal accidents on interstate railroads, where the courts have regularly decided that the applicable death act is that of the state wherein the accident occurred, rather than that of the state wherein the victim happened to die."

And in a note the learned authors say:

"In many cases where the fatal injury occurred on the water, the court neglected to state whether the ensuing death occurred on land or on water, evidently regarding this fact as not significant. *State of Maryland* v. *Hamburg American Steam Packet Co.* (1911, D. C. Md.), 190 Fed. 240; *Young* v. *Clyde Steamship Co.*, 294 Fed. 549. See *Souden* v. *Fore River Shipbuilding Co.* (1916), 223 Mass. 509, 112 N. E. 82; *The Schooner Robert Lewers Co.* v. *Kekauoha*, 114 Fed. 849. * * *

"* * * It is submitted, however, that the place where the victim happens to die is without significance in applying this distinction between the death acts and the survival acts. *Needham* v. *Grand Trunk R. R.* (1865), 38 Vt. 294; *Rudiger* v. *Chicago, St. Paul R. R.* (1896), 94 Wis. 191, 68 N. W. 661; *Louisville & Nashville R. R.* v. *Williams* (1896), 113 Ala. 402, 21 So. 938; *Van Doren* v. *Pennsylvania R. R.* (1899, C. C. A., 3d), 93 Fed. 260; *Alaska Commercial Co.* v. *Williams* (1904, C. C. A., 9th), 128 Fed. 362; *De Harn* v. *Mexican Nat. Ry.* (1893), 86 Tex. 68, 23 S. W. 381. See *Slater* v. *Mexican Nat. Ry.* (1904), 194 U. S. 120."

The death statute of the District of Columbia is a counterpart of the Oregon statute. A seaman died at sea from improper food. An action was brought under this statute for his wrongful death which occurred in South Africa, and it was contended that the laws of this country did not give a right to a cause of action for wrongful death, and in applying the law of the flag of the vessel's registry, the Circuit Court of Appeals held that the fact of death is not the tort but its consequence, and the cause of action arose from the injury resulting in death and that death did not constitute the tort. See *U. S. S. B. E. F. Corp.* v. *Greenwold* (C. C. A.), 16 Fed. (2d) 948. In other words, the tort which produces death gives rise to the cause of action and the death is the damage.

In a note to recent cases in commenting on *Pickles* v. *F. Leyland & Co.* (D. C.), 10 F. (2d) 371, holding in favor of appellee's contention, the editors point out that *Campbell* v. *Luckenbach S. S. Co.*, 5 F. (2d) 674, overruled the *Kaian Maru* case, saying:

> "When the negligence which causes an accident resulting in death or injury occurs in one state or country and the accident itself in another, the law of the latter place governs (citing cases). * * * And so where death is the only operative fact occurring within a state the wrongful death statute of that state does not impose responsibility (citing cases). * * * And if the fatal force is applied to the body of the deceased on navigable waters, admiralty has jurisdiction even though the death occurs on shore. *The Chiswick*, 231 Fed. 452; *Liverani* v. *John T. Clark & Son*, 176 N. Y. S. 725; *The*

Samnanger, 298 Fed. 620; *The Anglo Patagonian*, 235 Fed. 92; *Campbell* v. *Luckenbach S. S. Co.*, 5 F. (2d) 874. However, a few cases, including the instant decision, have held that if the death occurs on land admiralty has no jurisdiction. *The Kaian Maru*, 2 F. (2d) 121 (apparently overruled though not cited by the decision in *Campbell* v. *Luckenbach S. S. Co.*, *supra*); *Ryley* v. *Philadelphia & R. Ry. Co.*, 173 Fed. 839. This minority doctrine is based upon an interpretation of the Federal Death Act which makes the *death* the wrongful act for which the action is given on the theory that the statute is not a *survival* statute, but a *death statute*. *Hughes, Death Actions in Admiralty* (2d Ed. 1920), 236. But what seems to be the better view is that the application of fatal force to the body of the victim should be the gist of the action. Under this view the Federal Death Act would apply when death occurs on land from an injury at sea" (page 1007).

In *Resiano* v. *F. Jarka Co.*, 162 N. E. 13, at 16, it was held:

> "Since the wrong was done upon the waters, the circumstance is unimportant that the death which followed was upon the land."

This case was reversed on certiorari, but on entirely unrelated grounds. (See 75 L. Ed. 182.)

The construction sought to be imposed is not in harmony with the weight of authority, and is a distinction which, if applied, will deprive citizens of this country of any remedy for the wrongful acts of vessels having the privileges of our ports over those of the owners of our own merchant marine who can be held in a common law action for our local courts, and the distinction

sought to be made is too fanciful to be applied in modern day jurisprudence.

It is a matter of common knowledge that certain foreign nations which maintain large competitive merchant fleets buy up, at a fraction of their cost, vessels which have been out-serviced and condemned by other nations, and carry on an active trade with such vessels with the United States. These vessels come into ports with their gear deteriorated from age and use and unsafe to perform the services for which it was intended. The *Kaian Maru* relied on by respondent is an illustration where a man came to an untimely death by the using of "shot" ship's gear. And as long as the Government does not subject foreign owned vessels to inspection, as to their seaworthiness, as other countries do, just such accidents as happened to Catino can be expected, and to permit such vessels to evade liability on mere technical grounds is depriving the citizens of this country of their lives and property without due process of law. Until the decision of this Court in *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, was handed down, many courts were disposed to apply the law of the flag with too much consideration to secure exact justice to its citizens and resident aliens. (See *Uravic* v. *Jarka Company*, 282 U. S. 234.)

Respectfully submitted,

ARTHUR I. MOULTON,
WM. P. LORD,
Proctors for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 469.—October Term, 1932.

Vancouver Steamship Company, Ltd., Petitioner, *vs.* Theresa Rice, Administratrix of the Estate of Vincent Catino, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 13, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner is the owner of the steamship City of Vancouver. December 1, 1929, she was at Westport, Oregon, in navigable waters of the Columbia taking on a cargo of lumber. Respondent's intestate was employed by contracting stevedores who were loading her. While upon the deck of the ship helping in that work he was struck by a falling sling load of lumber and mortally injured. He was taken ashore where he died an hour later. Respondent was appointed his administratrix and, electing under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., § 933) to assert her claim against a third party, filed a libel in admiralty in the district court of Oregon against the ship, claiming on behalf of his estate damages in the sum of $10,000. The libel alleged in substance that intestate's death was caused by reason of petitioner's negligence in respect of the ship's winch which was being used to hoist the lumber.

Petitioner excepted to the libel, asserting that the cause of action arose on land and not upon the water and that therefore the case is not within the admiralty jurisdiction. The district court so held and dismissed the libel. The Circuit Court of Appeals reversed. 60 F. (2d) 793.

The Oregon statute creating a cause of action for death by wrongful act provides: "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he

lived, against the latter, for an injury done by the same act or omission". Oregon Code (1930), § 5-703. And the Oregon Boat Lien Law declares that every boat or vessel shall be subject to a lien "for damages or injuries [done] by such boat or vessel resulting in the death of any person". § 51-601. Admiralty courts have jurisdiction to enforce such liens. *The Corsair*, 145 U. S. 335, 347. *The Anglo-Patagonian*, 235 Fed. 92, 94.

The libel alleges no cause of action that accrued to the deceased. The only cause of action here involved is that created by the Oregon statute and it did not arise until the intestate died. The sole question is whether the happening of the fatal event upon navigable waters gave the admiralty court jurisdiction notwithstanding death occurred on land. The right to recover for death depends upon the law of the place of the act or omission that caused it and not upon that of the place where death occurred. *Van Doren* v. *Pennsylvania R. Co.*, 93 Fed. 260, 264. *De Harn* v. *Mexican National Ry. Co.*, 86 Tex. 68. *Rudiger* v. *Chicago, St. Paul, Minneapolis & Omaha R. Co.*, 94 Wis. 191, 194. *Needham* v. *Grand Trunk R. R. Co.*, 38 Vt. 294, 311. *Louisville & Nashville Railroad Co.* v. *Williams*, 113 Ala. 402, 405. Where a longshoreman working upon the land assisting in the unloading of a ship was struck by a sling of cargo and knocked into the water where he died, this court held that the state compensation act and not the maritime law governed. *Smith & Son* v. *Taylor*, 276 U. S. 179. Defendant conceded that the state law would apply if the deceased had been killed on the land. But it argued that, as no claim was made for injuries there sustained and that as the suit was solely for death, the case was exclusively within the admiralty jurisdiction. We said (p. 182): "But this is a partial view that cannot be sustained. The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death." *Mutatis mutandis*, what was there said is applicable here.

The substance and consummation of the occurence which resulted in intestate's death and so gave rise to respondent's cause of action took place on the deck of the ship lying in navigable waters. The damages allowed by the Oregon statute are those resulting solely from the death. The foundation of the right to recover is a wrongful act or omission taking effect aboard the ship

and resulting in death upon the land. This is a maritime tort, and upon it the respondent's claim rests. The admiralty court has jurisdiction. *The Chiswick*, 231 Fed. 452. *The Anglo-Patagonian*, *supra*, 94. *The Samnanger*, 298 Fed. 620, 624. *Shipping Board* v. *Greenwald*, 16 F. (2d) 948, 951.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.